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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-7331

FERINAND GRAVES, ET AL., *Petitioners*,

vs.

JAMES T. LYNN, SECRETARY, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ET AL., *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Eighth Circuit, entered September 3, 1974, setting aside the district court's permanent injunction and directing that the Department of Housing and Urban Development be permitted to complete permanent financing of a federally-subsidized housing project in Kansas City, Missouri.

OPINIONS BELOW

The opinion of the court below (Appendix A, *infra*, pp. A1-A8) is not yet reported. The decisions of the District Court for the Western District of Missouri (Appendix B, *infra*, pp. A9-A25) are also unreported.

JURISDICTION

The court below entered its judgment on September 3, 1974. (Appendix A, *infra*, p. A1.) Petitioners' motion for rehearing was overruled on October 2, 1974. (Court of Appeals Proceedings, p. 16.) The jurisdiction of the Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

Where a federally-subsidized housing project is innovated and constructed in violation of the 1964 and 1968 Civil Rights Acts, despite timely notice to the Government and developers of the alleged violation and a pending suit to determine same, does the remedy of enjoining further federal financial assistance become improper because the project is substantially completed at the time of judgment?

STATUTORY PROVISIONS INVOLVED

The pertinent portions of the Housing Act of 1949, 42 U.S.C. §1441 *et seq.*, the Civil Rights Act of 1964, 42 U.S.C. §2000d *et seq.*, and the Civil Rights Act of 1968, 42 U.S.C. §3601 *et seq.*, are set forth in Appendix C, *infra*, pp. A26-A30.

STATEMENT OF THE CASE

Petitioners are eighteen residents, black and white, of a racially integrated neighborhood in south Kansas City, Missouri affected by the construction of a federally-subsidized 110-unit apartment project. (A. 7-8.)[1] Invoking

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1. The record here consists of the Appendix and Appendix Vol. II filed in the court below and designated respectively herein as "A" and "A.II," together with the transcript of the Proceedings in the U.S. Court of Appeals for the Eighth Circuit.

jurisdiction under 28 U.S.C. §§1331, 1343, 1361 and 2201,[2] petitioners filed suit on June 18, 1971 in the U.S. District Court for the Western District of Missouri to enjoin federal financial assistance to the project on the ground that its location in a transitional area struggling to remain integrated would irrevocably accelerate the transformation of the neighborhood into a segregated black community in violation of the Civil Rights Acts of 1964 and 1968. (A. 7-15.) At the time of the trial in June, 1972, one year after suit was filed, the project was largely constructed. The district court held that the project was in violation of the Civil Rights Acts and enjoined further federal financial assistance. On the Government's appeal as to the remedy only, the Eighth Circuit Court of Appeals held that the enjoining of further federal financial assistance was improper because the project was essentially completed.

The Project and Protest Against It

The underlying facts in this case are not in dispute. The proposed East Hills Village project was a federally assisted low and middle income housing project of 110 units, innovated pursuant to Section 236 of the Housing Act of 1949, 12 U.S.C. §1715z-1, which is administered by the U.S. Department of Housing and Urban Development (hereinafter referred to as HUD).

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2. Federal jurisdiction was invoked on the following grounds: (a) This case arose under the laws of the United States, specifically the Civil Rights Acts of 1964 and 1968 and the National Housing Act, and the amount in controversy exceeded $10,000.00. 28 U.S.C. §1331. (b) Petitioners sought and obtained equitable relief under the Civil Rights Acts of 1964 and 1968. 28 U.S.C. §1343. (c) This action was in the nature of a mandamus action to compel defendant employees of the United States to perform their duties to petitioners under the Civil Rights Acts of 1964 and 1968. 28 U.S.C. §1361. (d) This action sought a declaration of the rights of petitioners with regard to federal assistance to a multi-unit project in their neighborhood. 28 U.S.C. §2201.

The project history and litigation, which the district court characterized as "unbelievable" (Appendix B, p. A9)[3], was summarized by the district court as follows (after enumerating the unsuccessful efforts of the residents and Southeast Homeowners' Association from November, 1970 through May, 1971 to obtain a hearing by HUD regarding the proposed project location):

> "Representatives of the association then contacted the City Council, which expressed dismay at the proposal of such a project being built at the proposed location. On May 21, 1971, the Mayor of Kansas City, Missouri issued a statement on 'the need for a policy of dispersal in minority housing in the Kansas City Metropolitan Area,' specifically condemning the federally assisted project at 75th and Cleveland Avenue. On the same date, the HUD officials received a letter from the attorney for the Southeast Homeowners' Association advising that the association intended to take legal action to prevent the funding of the project.
>
> On May 27 attorneys for the plaintiffs visited the HUD Director at his office, requesting a hearing and advising him that the City Council was considering a resolution requesting reconsideration of the project. They were advised that the project would be funded and no hearing would be allowed. On the next day plaintiffs' attorney delivered to the Area Director a letter advising him that an immediate suit would be filed for an injunction against this project.

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3. The district court's April 6, 1973 Memorandum Opinion and Judgment sets forth the background facts regarding the project in considerable detail. (Appendix B, pp. A9-A18.) As the Government took no appeal from the district court's determination that the project violated the 1964 and 1968 Civil Rights Acts, but only challenged the injunction remedy provided, the court of appeals in its opinion below did not delineate such facts (Appendix A, pp. A3-A4), which similarly are not in dispute here.

On the same day, May 28, 1971, the City Council of Kansas City, Missouri adopted a resolution requesting HUD to hold a public hearing on the proposed project at 75th and Cleveland. The Area Director responded to this resolution by a letter stating that a public hearing 'goes beyond the requirements of federal statute and HUD procedures and, therefore cannot be held.' The Mayor responded to this with citations to a number of federal cases (which will be discussed later) in which decisions of HUD on the location of such projects had been reversed, and certain criteria for the location of such projects had been established.

Without any public hearing, and without any further evaluation or consideration of the protests by the residents, by the City Council, and by the Mayor, the HUD Director signed a so-called 'feasibility letter' on June 3, 1971." (Appendix B, pp. A11-12.)

Notice to Interested Parties and Filing of Suit

All parties interested in the project had notice of its alleged illegality before any commitment was issued by HUD for financial assistance, the construction commenced or money paid.

On May 20, 1971, counsel for petitioners notified HUD officials, as well as the owners and developers of the proposed project, that petitioners intended "to immediately take appropriate legal action, through administrative appeals and appropriate court action, to enjoin construction of such federally assisted project . . . ." (A.II 4.)

On May 28, 1971, counsel for petitioners hand-delivered a notice to HUD, Attention Area Director, advising that "we will, on behalf of our client, file a law suit early

next week for appropriate legal relief including, but not limited to, an injunction against any federal assistance for East Hills Village." (A.II 6.)

On June 3, 1971, HUD issued to the developer a "Feasibility Letter" in which it invited the developer "to submit, through your mortgagee, an application for Firm Commitment, for project mortgage insurance on the captioned project." (A.II 1.) As noted by the district court "Admittedly, such a letter was not a binding contract between HUD and the developers. The only effect of the letter was to allocate and freeze the funds for the project before the close of the government's fiscal year on June 30." (Appendix B, p. A12.)

Petitioners filed suit on June 18, 1971 against the Secretary, Regional Director and Area Director of HUD and also against the four owner-developers of the project. (A. 8.) Said owner-developers were named as defendants solely for the purpose of giving them notice and affording them an opportunity, if desired, to defend and represent their interests. No relief was sought against these defendants (A. 13) because, as owners of private property, they could develop such property as they wished. Only the federal defendants could be enjoined from acting and giving federal financial assistance under the National Housing Act.

The owner-developers did not desire to be directly represented in the action and were dismissed from the case on March 13, 1972, the district court noting that "Said defendants desire such dismissal." (A. 23.)

As the district court thereafter stated:

> "The defendants, and the developer, and the lender proceeded to innovate and complete this project after bitter protest by the Mayor of the City, the City

Council, and written notice from the attorney representing many of the adjoining residents. Practically all the work on the project was done after this suit was filed, and certainly all was done after notice that a suit would be filed . . . ." (District Court October 9, 1973 Order and Final Judgment, Appendix B, p. A24.)

Financing and Construction of the Project

Despite the fact that this suit to enjoin federal financial assistance to the project was pending, HUD, the developers and the financers of the project elected to proceed with full knowledge of the alleged illegality of federal financial assistance to the project.

"The actual HUD commitment (A. 71-74), which was a contract with the developers, was executed November 19, 1971" (Appendix B, p. A12), five months after petitioners' suit was filed. Petitioners did not seek a temporary injunction because, as the district court noted, "they were in no position to give the substantial bond that would have been required to stop construction." (Appendix B, p. A17.) Petitioners could not prevent the developers, who were initially defendants herein, from building an apartment project, with or without bond.

Construction of the project was financed through an interim federally-insured loan dated December 28, 1971 in the amount of $2,152,200.00 to East Hills Village Ltd., a partnership comprised of the owner-developers of the project who at that time were still defendants in the suit. (A. 54.) The note given to repay the loan (A. 69-70) was secured by a deed of trust on the project. (A. 63-68.) The loan was structured in such a way that HUD made "interest reduction payments amounting to $7,286.00 per month which represent the difference between an inter-

est rate of one percent and an interest rate of seven percent on the mortgage principal." (Appendix A, p. A4.)

The project was commenced and substantially completed by the time of trial in June, 1972, one year after the filing of petitioners' suit. (A. 32.) The effect on the neighborhood was that whites and blacks exodused from the area, many stores closed and the neighborhood became almost totally segregated and occupied by blacks. As the district court pointed out:

> "Unfortunately, some of the harm done by the improvident authorization of this project has already occurred by sales of homes in the neighborhood." (Appendix B, p. A17.)
>
> "The figures [contained in the Government's report regarding the project] fully corroborate the basic complaint of the plaintiffs that the location of the project would increase segregated housing in violation of the Civil Rights Act." (Appendix B, p. A23.)
>
> "The plaintiffs in this case have been grievously harmed by the callous indifference of the law by a government bureau." (Appendix B, p. A24.)

April 6, 1973 District Court Memorandum Opinion and Judgment

Turning to the applicable law, the district court noted that HUD had issued proposed regulations in June of 1971 setting forth criteria in regard to implementing the 1968 Civil Rights Act, 36 F.R. 12032/38. (Appendix B, p. A12.)

> "[B]ut even more important, in 1970 the Third Circuit had decided the case of *Shannon* v. *HUD*, 436 F.2d 809, which held that HUD 'must utilize some institutionalized method whereby in considering site selec-

> tion or type selection it has before it the relevant racial and sociological information necessary for compliance with its duties under the 1964 and 1968 Civil Rights Act.' " (Appendix B, p. A12.)

The district court found that the HUD officials here had clearly not complied with such requirements as to the East Hills Village site. The district court stated:

> "There is no evidence whatsoever that any institutionalized method was used or even considered. The overwhelming weight of the evidence from the defendants' own witnesses is that they had the money available to approve four or five projects in the Kansas City Metropolitan Area before June 30, 1973, or they would 'lose' the money. The evidence further indicates that their sole concern was economic feasibility of the projects to be approved and that they totally disregarded all other considerations. There was no contact made with a single resident of the area of the proposed location, nor with any of the planning commissions of the City of Kansas City. There was no investigation of the school situation, either in regard to overcrowding or in regard to racial balance and the impact of a large project such as this in the school district." (Appendix B, pp. A12-A13.)

The district court thus stated that "under the authority of *Shannon* v. *HUD*, *supra*, the plaintiffs could be granted the requested relief upon the facts stated above." (Appendix B, p. A13.)

Nevertheless, the district court went on as follows:

> "However, the Court heard a great deal more evidence on the question of whether the decision by the defendants to finance the 75th and Cleveland project vio-

> lated plaintiffs' civil rights. The facts which HUD should have considered and taken into account in its determination as to the feasibility of this project under the 1964 and 1968 Civil Rights Acts were fully developed, in detail, and documented by a large number of exhibits." (Appendix B, pp. A13-A14.)

The district court summarized such facts: The project was located at the southern end of a "black belt" where housing for blacks is concentrated in Kansas City (Appendix B, p. A14); "the increase in racial concentration of minorities has been accompanied by neighborhood deterioration and the creation of slums and blighted ghettos" (Appendix B, p. A14); the racial character of the neighborhood near the project ranged from 5% to over 62% black (*ibid*); the public high schools serving the project were over 90% black and "the most overcrowded schools in the Kansas City school system" (Appendix B, p. A15); the likely result of the project will be that "the 500 occupants of the apartments will be almost exclusively black, the racial balance of the neighborhood will be tipped heavily, and the schools will not only be even more crowded, but the percentages of black pupils will be increased." (Appendix B, p. A16.)

The district court summed up this portion of its opinion as follows:

> "A number of witnesses who work for commissions, councils and the school board in the field of city planning, housing, and human relations all testified that the impact of this project would be, in the words of one witness, a catastrophe, because it will have an adverse effect on previously successful efforts by blacks and whites to keep racially balanced neighborhoods. The reason being that the white residents will lose hope that the area can remain balanced, and when

they begin their exodus, the black residents who take pride in their homes will also leave, because they know that blight can soon be expected.

The opinions of all these witnesses, many professionals in their fields, all very experienced in the patterns of racial housing were completely available to HUD before any decisions were made on this project. Certainly, after the location was condemned by the City Council and by the Mayor and the association of homeowners of the neighborhood, there was no reason that the HUD officials could not have re-examined their position and made at least some evaluation of the questions raised by these protesting organizations and officials. This is especially true in view of the obvious fact that no consideration was given by HUD, in their original evaluation of the site, to the effect of the project on racial segregation, or school segregation, or on any of the other socio-economic and racial factors which should have been considered. A great deal more evidence could be summarized, all of which would be cumulative." (Appendix B, pp. A16-A17.)[4]

The district court therefore found "all of the issues in this case in favor of the plaintiffs" and that they were "entitled to relief under the Civil Rights Acts of 1964 and 1968." (Appendix B, p. A18.) The district court enjoined the HUD officials from "taking any further steps in the

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4. After the trial in the district court, it was learned that the HUD employees who investigated the impact of the project on the racial character of the area had themselves concluded the project would have a material adverse effect on the racial character of the neighborhood and therefore was in violation of the Civil Rights Acts. Memoranda evidencing this fact were not referred to or produced in response to petitioners' interrogatories and motions to produce filed before trial, and their concealment is the subject of a contempt proceeding yet pending in the district court. (A.II 8-10.)

finalization of mortgage insurance on the East Hills Village Project" and further restrained them "from giving, granting, making or paying any type of federal financial assistance to this project." (Appendix B, p. A18.) Directing the Government to furnish certain tenancy and financing statistics, the court retained jurisdiction to determine "what relief may be necessary in connection with the completed apartments to further implement this decision and give full relief to the plaintiffs herein." (Appendix B, p. A19.)

Subsequent District Court Proceedings

On May 18, 1973, the district court entered an Order Denying Defendants' Motion for New Trial. (Appendix B, pp. A20-A22.) Further particularizing its earlier decision in light of *Shannon* v. *HUD, supra,* the court said:

> "Every employee of the defendant who was a witness testified that there was no institutionalized procedure used implementing the Civil Rights Acts and, in fact, the defendants' evidence overwhelmingly demonstrated that racial and sociological information was never considered in the site selection process." (Appendix B, p. A21.)

The court further commented on the Government's claim that the court refused to consider evidence that the Government re-evaluated the project in accordance with its proposed rules and regulations to meet the *Shannon* criteria. The court responded:

> "The Court did admit and hear all of the evidence as to this reevaluation, after the project had been fully approved and commitments made, and considered it as having no basis in fact . . . . This after-the-fact evaluation was obviously an attempt to justify, to their

> superiors, a very bad decision which had been made many months before by the Kansas City office. The only evidence this Court recalls having refused to admit was the further evidence that this 'paper picture', which was not based on facts, was then approved back in Washington." (Appendix B, pp. A21-A22.)

After the Government filed certain unit and tenant statistics and federal financial assistance amounts (A. 49-52) called for by the April 6, 1973 opinion, the district court on October 9, 1973 entered its Order and Final Judgment and overruled the Government's Motion to Stay Injunction filed August 7, 1973. (Appendix B, pp. A23-A24.) The court noted that the HUD report showed then that the "housing project in question was fully occupied," with adult tenants being 86% black and 14% white and minor tenants being 89% black and 11% white, and the court commented that "these proportions of black tenancy are exactly as anticipated by all the witnesses for the plaintiffs at the trial of this case, and exactly the opposite as that prophesied by the so-called expert employees of HUD." (Appendix B, p. A23.) The court then said:

> "The figures fully corroborate the basic complaint of the plaintiffs that the location of the project would increase segregated housing in violation of the Civil Rights Act.
>
> The Court asked for these figures in the faint hope that, if a balanced racial mixture of tenants had resulted, the drastic remedy of an injunction might not be necessary. The pending motion to stay the injunction has no merit . . . . The defendants, and the developer, and the lender proceeded to innovate and complete this project after bitter protest by the Mayor

of the City, the City Council, and written notice from the attorney representing many of the adjoining residents. Practically all the work on the project was done after this suit was filed, and certainly all was done after notice that a suit would be filed, and even more important, from a judicial viewpoint, the whole project was authorized, commenced and completed after the decision of the case of *Shannon* v. *HUD*, 436 F.2d 809. The plaintiffs in this case have been grievously harmed by the callous indifference of the law by a government bureau. The motion of the defendants, if granted, would deny these plaintiffs no [sic] relief for the injustice perpetrated upon them. It would be a hollow victory, indeed, if this Court, after finding all the issues in favor of the plaintiffs, would take the attitude that plaintiffs' cause is just but the law can grant them no relief." (Appendix B, pp. A23-A24.)

Thereafter the HUD officials filed a motion seeking the district court's authorization to take over and acquire the mortgage and to settle the mortgage insurance claims arising from default on the loan. (A. 124.) On February 14, 1974, the district court denied such motion as follows: "It is obvious that to grant it would completely nullify the Court's order in this case and would give the plaintiffs a very hollow victory. The Court's judgment is the only relief the Court can give these plaintiffs and it will not be nullified at this time." (Appendix B, p. A25.)

The Court of Appeals Opinion Below

Upon appeal to the U. S. Court of Appeals for the Eighth Circuit, the Government did not question the district court's determination that the East Hills Village project was innovated and constructed in violation of the 1964

and 1968 Civil Rights Acts.[5] HUD did appeal the relief which the district court ordered, as acknowledged by the court of appeals: "Only the remedy fashioned by the district court—enjoining the Secretary of HUD from rendering further federal financial assistance to the project—is here at issue." (Appendix A, pp. A3-A4.) In this regard the court of appeals reversed and ordered that on remand the district court should "permit HUD to complete permanent financing of this project." (Appendix A, p. A8.)

The court of appeals indicated that although the relief granted by the district court would have been appropriate if granted before construction had begun, it was not appropriate after commencement of construction: "If plaintiffs had sought and the district court granted preliminary injunctive relief in June of 1971 when the original complaint was filed and before construction had begun, the usefulness of halting federal financial assistance would have been obvious. But such is not the case." (Appendix A, p. A5.) (The court of appeals footnoted: "The district court opinion notes that '[t]he plaintiffs in this case did not seek a temporary injunction because they were in no position to give the substantial bond that would have been required to stop construction.'" Appendix A, p. A5.)

The court of appeals then stated:

> "The relief provided by the district court in this case cannot achieve either the restorative or preventive functions of equity. First, enjoining federal financial assistance has the effect of virtually eliminating any public control over the project's operation. Second,

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5. In the Government's Brief for the Appellants filed below, p. 3, it was stated that "On this appeal, HUD does not challenge the district court's findings of civil rights violations." In its opinion the court of appeals similarly noted: "On this appeal, the Government does not challenge the findings of civil rights violations." (Appendix A, p. A3.)

this belated termination of federal support cannot alter the fact that the racial composition of this neighborhood has already become predominantly black. We must further recognize that the project has been constructed and is already occupied by almost two hundred tenants. Under these circumstances, termination of the governmental financial assistance promised to the owners and mortgagee is not an appropriate remedy." (Appendix A, pp. A5-A6.)

Petitioners' motion for the court of appeals to rehear the matter en banc (Court of Appeals Proceedings, pp. 10-15) was overruled on October 2, 1974. (Court of Appeals Proceedings, p. 16.) On October 16, 1974, pursuant to petitioners' motion, the court of appeals stayed the issuance of its mandate to and including November 8, 1974, with the stipulation that if by then there is filed with the Eighth Circuit clerk a certificate of the U. S. Supreme Court that a petition for certiorari has been filed, "the stay hereby granted shall continue until the final disposition of the case by the Supreme Court." (Court of Appeals Proceedings, p. 17.)

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts With the Decisions of Other Federal Courts of Appeal as to the Appropriateness of Enjoining Federal Financial Assistance to an Illegal Project Which Has Been Essentially Completed. In particular, the Eighth Circuit opinion in the instant case conflicts with decisions of the Third and Fourth Circuits.

(a) In *Shannon* v. *HUD*, 436 F.2d 809 (3rd Cir. 1970), plaintiffs sought to enjoin HUD from issuing a mortgage guaranty and from making rent supplement payments to tenants in connection with a low income housing project, Fairmount Manor in Philadelphia, alleged to have been

approved without compliance with the 1964 and 1968 Civil Rights Acts. As in the instant case, "while the suit was pending construction of Fairmount Manor proceeded to completion" and was "occupied" by the time of the Third Circuit's decision. *Id.* at 812. Nevertheless, the court held that, as HUD had failed to use adequate institutionalized methods to determine the effect of the project on the racial composition of the affected neighborhood in violation of the Civil Rights Acts, the case must be remanded to the district court "for the entry of an injunctive order prohibiting further steps in the finalization of mortgage insurance or other federal financial assistance to the project until such time as HUD makes a determination . . ." concerning the project's conformity with the Civil Rights Acts. *Id.* at 822-823. In its opinion, the court commented upon the possible remedies in the event HUD, after remand, made a determination that the project would increase or perpetuate racial concentration to the detriment of community improvement in violation of the Civil Rights Acts: "For example, the court could order that the project mortgage not be guaranteed under §221(d)(3) and that it be sold to a private profit-making owner." *Id.* at 822. Thus the Third Circuit recognized as an appropriate remedy the enjoining of federal financial assistance to a project found to be illegal even though the project was completed, and in fact explicitly ordered that remedy until determinations were made in compliance with the Civil Rights Acts.

The decision below is clearly at odds with *Shannon*. While the district court here properly relied on the Third Circuit opinion in *Shannon* in ordering the relief it did (Appendix B, pp. A12, A13 and A18),[6] the Eighth Circuit

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6. See, *e.g.*, the district court's statement below:

"The Court finds all of the issues in this case in favor of the plaintiffs. Their standing to sue and secure this relief is well analyzed and upheld in the case of *Shannon* v. *HUD, supra.*" (Appendix B, p. A18.)

in reversing cited and quoted from the district court's order after remand of *Shannon* (Appendix A, p. A7.)[7] But the district court proceedings upon remand of that case reflect that HUD conceded that the project location violated requirements of the Civil Rights Acts, and HUD and the plaintiffs therein agreed to the completion of permanent financing for the project on the condition that HUD retain a planner and architect to determine how to remedy the effects of the project. Inasmuch as the *Shannon* remand order of the district court suggesting possible remedies to be explored was pursuant to the agreement of all of the parties, plaintiffs therein consenting to completion of the federal financing, such order is of no real value as precedent in this case. The court of appeals decision in *Shannon* directing injunctive relief remains in clear conflict with the Eighth Circuit opinion here.

In short, with both decisions involving illegal and completed housing projects, in *Shannon* the Third Circuit remanded for "the entry of an injunctive order prohibiting further steps in the finalization of mortgage insurance or other federal financial assistance to the project," 436 F.2d at 822; and in the instant case the Eighth Circuit remanded to "permit HUD to complete permanent financing of this project". (Appendix A, p. A8.)

(b) The decision below is also contrary to the principles and remedy announced in *Ely* v. *Velde*, 497 F.2d 252 (4th Cir. 1974). In the litigation involved in that case, the federal Law Enforcement Assistance Administration (LEAA) had originally been enjoined from allocating

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7. Although the *Shannon* remand decision is unreported (February 11, 1972 Order of the U.S. District Court for the Eastern District of Pennsylvania, Civil Action No. 69-197), the Eighth Circuit relied upon an excerpt therefrom set forth in the Government's brief filed below. (Appendix A, p. A7.)

to the State of Virginia $775,000.00 of federal funds for construction of a penal center where there had not been compliance with the National Environmental Policy Act (NEPA) and National Historic Preservation Act (NHPA), requiring an environmental impact statement. *Ely* v. *Velde*, 451 F.2d 1130 (4th Cir. 1971). An impact statement was thereafter completed but it was adverse, and therefore the State withdrew its application for federal funding of the center and, without objection from LEAA, reallocated the funds to other programs in the Virginia penal system. The Fourth Circuit held in 1974 that the environmental acts of Congress could not be so circumvented. While Virginia could proceed with its own funds to complete the facility,[8] the court nevertheless held that:

> "if it is to be constructed without compliance with federal environmental Acts, the state must reimburse the federal government for sums initially allocated to the center, but subsequently diverted to other state projects," 497 F.2d at 254.

In commenting on the device attempted for avoiding the law, the court of appeals said:

> "Here, too, Acts of Congress will be subverted if the state builds the center in disregard of NEPA and NHPA while retaining the federal funds initially allocated for its construction . . . .
>
> . . . .
>
> Nor do we agree that the transfer of funds to new projects, as distinguished from existing projects, purges the state's bookkeeping transaction . . . . The

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8. Similarly here, the owner-developers could have proceeded to construct their apartment project without federal financing, and for this very reason petitioners did not seek any relief from them in their injunctive prayer upon filing suit. See Statement, *supra*, pp. 6-7.)

> significant point is that the state is retaining federal funds that it obtained for the center on the premise that it would comply with federal environmental Acts, while at the same time it is planning to construct the center without compliance . . . ." *Id.* at 255-256.

The fundamental and sound holding of *Ely*, therefore, is that federal funds cannot be used for a project that does not comply with federal law. And yet the Eighth Circuit opinion below flies squarely in the face of such principle by explicitly authorizing the continued use of federal moneys for a project which indisputably violates the U. S. Civil Rights Acts. Such a conflict can only be resolved by this Court.

2. The Decision Below Raises Significant and Recurring Problems Concerning Use of Federal Funds for Projects Held to Be Illegal and Presents an Important Question of Federal Law Which Should Be Settled by This Court.

Petitioners contend that: (a) Where a project is held to be in violation of law, to eliminate as a remedy enjoining federal financial assistance to such project simply because construction has commenced is to establish a precedent which encourages governmental agencies and those with whom they contract to flout the law and proceed, despite notice of such illegality, at the taxpayers' risk and to the damage of those the law was designed to protect. (b) The injunction granted by the district court below was an appropriate remedy to halt the further illegal use of federal funds, and the only real relief where, as here, there is no practicable restorative remedy.

(a) The Eighth Circuit erred in eliminating altogether the possibility of enjoining federal financial assistance to an illegal project solely because the project was

essentially completed. If the courts are thus limited in fashioning a remedy, the knowledge of that limitation will remove the constraints that ordinarily keep developers and governmental agencies from proceeding with projects challenged as being in violation of the law. Developers and contractors threatened with a suit contesting the legality of a project, will be encouraged to race to complete it with no risk to themselves but with substantial risk to those the law was designed to protect and to the taxpayers who will pay for the project.

Although this suit was filed June 18, 1971, the owner-developers proceeded with a financial commitment obtained from HUD on November 19, 1971, and essentially completed the apartment project by the time of trial in June, 1972. (A. 3, 32.) As the district court stated in its final judgment: "Practically all the work on the project was done after this suit was filed, and certainly all was done after notice that a suit would be filed . . . . The plaintiffs in this case have been grievously harmed by the callous indifference of the law by a government bureau." (Appendix B, p. A24.)

Ordinarily, because of respect for the law as well as good business sense, where a suit is pending to enjoin federal financial assistance to a project because of alleged illegality, the developer does not elect to take the risk of proceeding and not obtaining federal funds. He awaits judicial weighing of the issues. If the determination is against legality, no damage has been done. If the determination is in favor of legality, the developer has simply been delayed—an inevitable consequence of a system of laws and one that infrequently occurs because most such projects are not the subject of litigation. Further, as a practical matter, in any substantial matter involving real risk of damage, a developer desiring to do so can ordi-

narily obtain a speedy hearing and determination in a suit for an injunction or other equitable relief. Compare *National Railroad Passenger Corporation* v. *Missouri Pacific Railroad Company*, 501 F.2d 423, 425 (8th Cir. 1974), in which a temporary restraining order was issued on the same day the complaint was filed, a hearing on a preliminary injunction was held two days later and the injunction denied. The appeal of the district order was heard two days thereafter in the Eighth Circuit, with the hearing on the merits being held within three months on May 17, 1974 and the case decided on July 25, 1974. And see at the appellate level this Courts' accelerated proceedings in, *e.g.*, *United States* v. *Nixon*, ___ U.S. ___, 41 L.Ed.2d 1039 (1974); *New York Times Company* v. *United States*, 403 U.S. 713 (1971); *Aaron* v. *Cooper*, 358 U.S. 1 (1958).[9]

If the Eighth Circuit's decision is allowed to remain law, a governmental agency's proceeding in disregard of alleged violation of law will become the rule rather than the exception. The Government will safely substitute its judgment for that of the court, knowing the project must be paid for with federal funds whatever the court's determination on legality.

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9. The record in this case shows that petitioners pressed for an early trial because of the threatened damage to the neighborhood by the project. See plaintiffs' suggestions in support of Motion to Compel Answers to Interrogatories, filed November 8, 1971. (A. 1.) The Government persistently delayed: The Government's Answer was not filed until October 22, 1971, over four months after the filing of the Complaint. (A. 1, 19.) Despite petitioners' two motions (filed November 8, 1971 and February 18, 1972) to compel answers to interrogatories filed October 1, 1971 and October 19, 1971, and two Orders compelling same (November 15, 1971 and March 13, 1972), the Government's answers to interrogatories were not filed until March 20, 1972 (A. 1, 2), five months after the interrogatories were filed and when the project was almost completed. Compare *Shannon* v. *HUD*, 436 F.2d 809, 812 (3rd Cir. 1970), where the court of appeals reviewed the pleadings in district court and said "An accelerated hearing followed."

HUD argued below that the order of the district court would cause devastating harm to innocent third persons, the owner-developers and mortgage lenders, who are not now parties to this litigation. The facts are that there were no "innocent parties," as is shown in the Statement herein, *supra*, pp. 5-7, and the district court's opinion there quoted. All interested parties had notice of the instant suit before any commitment was issued by HUD or construction commenced, and the owner-developers were parties to the litigation until dismissed at their request (A. 23) after the issuance of the commitment by HUD (A. 71-74) and the making of the construction loan. (A. 54, 69-70.)[10] The owner-developers and lenders elected to proceed knowing the commitment was alleged to be illegal and void, and that they might ultimately have only the Note (A. 69-70) and Deed of Trust (A. 63-68) to secure their financial undertaking.

(b) The decision of the court of appeals below establishes the precedent that if government agencies and their contractors proceed to construct a project which they know or have reason to believe is in violation of law, the judgment and relief can then deal only with the project constructed and attempt to ameliorate the damage that resulted from the calculated violation of law, and cannot include enjoining further federal financing of the project. In those instances where there is no practicable curative remedy, as is frequently the case, the decision of the Eighth Circuit will require continued federal financing nevertheless, despite the incurable illegality of the project. In view of the number of protective laws, such as civil rights

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10. These crucial facts demonstrate that as to injunctive relief the instant case is actually an *a fortiori* one from *Shannon* where the commitment had already been issued by HUD before suit was filed.

acts, environmental statutes and urban redevelopment laws, governing the conditions and circumstances under which federal funds can be used, the question presented by the decision below is obviously a significant and recurring one. As a practical matter, once the apartment project, penal facility, school, dam or pipeline is built, the damage sought to be avoided by Congress in passing protective laws is often done if the conditions required by law were not met. As in this case, there frequently is no practical restorative remedy. To eliminate altogether the enjoining of federal funding and order the trial court to find another remedy, in such instances, is in reality to ignore the problem and in effect to hold there is no relief.

In the instant case, the Eighth Circuit suggested the use of affirmative controls to promote racial balance in connection with the project. (Appendix A, p. A7.) This precise remedy, including the use of affirmative marketing and even quotas, was urged by the Government at the trial in support of its argument that the project would be integrated and not in violation of the Civil Rights Acts. (A. II 13-16.) The district court gave the Government and the developer an opportunity to prove their contentions. At the time of trial there were only twenty families occupying the project. (Transcript of trial testimony, pp. 274-275.) The district court delayed entering its final order until after it received a report regarding the racial composition of the project (see Statement, *supra*, pp. 13-14), and upon receiving the report commented:

> "The figures fully corroborate the basic complaint of the plaintiffs that the location of the project would increase segregated housing in violation of the Civil Rights Act.

> The Court asked for these figures in the faint hope that, if a balanced racial mixture of tenants had resulted, the drastic remedy of an injunction might not be necessary." (Appendix B, p. A23.)

The developers of the project, obviously making every effort to attract white tenants because of this pending suit, and even hiring a white manager to move in (Tr. 278, 281), could not integrate the project to any significant degree. And, of course, after the impact of the project on the neighborhood, the likelihood of integrating the project by affirmative racial controls is even less. As the district court foresaw in its first opinion:

> ". . . the result will be that the 500 occupants of the apartments will be almost exclusively black, the racial balance of the neighborhood will be tipped heavily, and the schools will not only be even more crowded, but the percentage of black pupils will be increased.
>
> . . . .
>
> . . . the impact of this project would be, in the words of one witness, a catastrophe, because it will have an adverse effect on previously successful efforts by blacks and whites to keep racially balanced neighborhoods. The reason being that the white residents will lose hope that the area can remain balanced, and when they begin their exodus, the black residents who take pride in their homes will also leave because they know blight can soon be expected." (Appendix B, p. A16.)

The district court had to deal with these established facts realistically in designing an appropriate remedy. In residential areas, unlike schools, courts cannot order dese-

gregation by bussing or other similar methods.[11] It was for these reasons that the district court ultimately said: "The Court's judgment is the only relief the Court can give these plaintiffs and it will not be nullified at this." (Appendix B, p. A25.)

In the final analysis, the Eighth Circuit decision below means that despite the illegality of the federal project and the practical unavailability of any means of making it comply with the law, the Government must continue to finance it. The initial mistake must be perpetuated at Government expense. Such a holding is not only at particular odds with *Shannon* and *Ely* discussed *supra*, pp. 16-20, but is also contrary to the well established general rule that an agreement which violates a statute, or which cannot be performed without violating a statute, is illegal and void. *E.g., Alleghany Corporation* v. *James Foundation of New York*, 214 F.2d 446, 450 (2nd Cir. 1954), *cert. denied*, 348 U.S. 913 (1955):

> "No court should encourage violation of the clear statutory policy by enforcing performance of such a contract—whether by awarding specific performance of the acquisition or damages for not performing . . . ."

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11. For this reason *Green* v. *School Board of New Kent County*, 391 U.S. 430 (1968), and *Davis* v. *Board of School Commissioners*, 402 U.S. 33 (1971), school desegregation cases relied upon by the Government in its Eighth Circuit brief, p. 26, are inapposite. Petitioners here did not seek to desegregate a school but to prevent the federally-funded segregating of a neighborhood. Further, even the housing case the Government cited below (Brief for the Appellants, pp. 26-27), *Rubylee Davis* v. *Romney*, 490 F.2d 1360 (3rd Cir. 1974), is not persuasive here because of its limited holding that five FHA-insured mortgagors, without any allegation of "intent to purchase another home," could not enjoin HUD from insuring under federal programs any more mortgages on homes which do not comply with the housing code, but could only obtain relief as to their homes. *Id.* at 1370.

And see *Parker* v. *United States*, 448 F.2d 793 (10th Cir. 1971) (Government and its contractor enjoined from performing a contract to sell timber until determinations were made regarding compliance with the Wilderness Act); *State of Georgia* v. *Mitchell*, 450 F.2d 1317 (D.C. Cir. 1971), and *Board of Public Instruction* v. *Finch*, 414 F.2d 1068 (5th Cir. 1969) (federal funds for school programs terminated where programs were administered in violation of the Civil Rights Acts).

It is therefore apparent that the Eighth Circuit decision below raises significant and recurring problems in connection with federally-financed projects which violate civil rights acts, environmental statutes and other laws, and that the matter should be reviewed and ruled upon by this Court.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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November, 1974

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 73-1897
No. 74-1145

Ferinand Graves, et al.,
Plaintiffs-Appellees,

v.

George Romney, Secretary, Department of Housing and Urban Development, et al.,
Defendants-Appellants.

Appeals from the United States District Court
for the Western District of Missouri.

Submitted: June 10, 1974.
Filed: September 3, 1974.

Before BRIGHT, STEPHENSON, and WEBSTER, Circuit Judges.

BRIGHT, Circuit Judge.

The Secretary of Housing and Urban Development appeals an order of the United States District Court for the Western District of Missouri, filed April 6, 1973, and made final on October 9, 1973, permanently enjoining the Secretary and the United States Department of Housing

and Urban Development (HUD) from giving any further financial assistance to the developers of East Hills Village, a federally-subsidized low and moderate income housing project located in Kansas City, Missouri.

Plaintiffs in this case—black and white residents of a racially integrated neighborhood adjoining the project—filed suit in June of 1971, while the project was still in the planning stage, claiming that HUD had violated their civil rights in selecting the East Hills Village site without considering the element of racial concentration. In essence, plaintiffs asserted that the HUD project would serve to tip the balance from an integrated neighborhood into an all-black neighborhood. In their complaint, petitioners alleged that:

> Past experience with low-income public and federally subsidized housing indicates that the residents of East Hills Village will be predominantly disadvantaged Negro residents of the City. The undue concentration of persons of a single race or socio-economic group in the neighborhood [will result in the transformation of that neighborhood] from a comfortable, attractive, integrated, middle-income environment to a segregated neighborhood characterized by urban blight which is at variance with the national housing policy enunciated in the Housing Act of 1949. An increase of racial concentration is prima facie evidence that the affected area will rapidly become a high density, low-income, segregated urban slum. Even the threat of such a radical change in racial, density and income level characteristics will cause a substantial exodus of residents of both races from the neighborhood in anticipation of that change. The present situation in the neighborhood is one of delicate balance and the construction or threat of construction of additional

> low cost rental housing will irrevocably accelerate the transformation of the neighborhood into a segregated racial and socio-economic community. The ultimate racial concentration will adversely affect the very quality of plaintiffs' and members of their class daily lives and will cause irreparable and immeasurable injury to their investments in homes and businesses.

After an evidentiary hearing, the district court held that the applicable law was contained in *Shannon* v. *HUD*, 436 F.2d 809 (3d Cir. 1970), where the Third Circuit read the Housing Act of 1949, 42 U.S.C. §1441 *et seq.*, together with the Civil Rights Act of 1964, 42 U.S.C. §2000d *et seq.*, and the Civil Rights Act of 1968, 42 U.S.C. §3601 *et seq.*, to require that HUD "must utilize some institutionalized method whereby, in considering site selection or type selection, it has before it the relevant racial and socio-economic information necessary for compliance with its duties under the 1964 and 1968 Civil Rights Acts." 436 F.2d at 821. Finding that HUD gave no consideration whatsoever to the impact of the East Hills Village project on racial concentration and attendant urban blight and that the impact of the project on the racial balance in the areas proximate to East Hills Village appeared to be a "catastrophe," the district court held that plaintiffs were entitled to relief under the Civil Rights Act.[1]

On this appeal, the Government does not challenge the findings of civil rights violations. Only the remedy fashioned by the district court—enjoining the Secretary of HUD from rendering further federal financial assistance

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1. By the time the district court announced its decision on April 6, 1973, the project was already substantially completed and occupied. At this time, the racial occupancy of the project was over 86 percent black.

to the project—is here at issue. In attacking the remedy, HUD emphasizes two points. First, that the injunction prevents the Government from completing its contractual obligations with those who built and financed this project and who are not parties to this action, thereby causing several hundreds of thousands of dollars of loss to these parties. Second, the injunction effectively removes the Government from any further involvement in the project of any kind, thereby eliminating the only agency which could be compelled to oversee the project in a manner which might at least ameliorate the existing racial imbalance. Plaintiffs counter the Government's arguments by asserting that private ownership and control of the project would be in the best interest of the neighborhood. They further state that: "Plaintiffs have no reason to expect better treatment and experiences from HUD than from a private owner of the project and good reason to expect total disregard for their interests."

It appears from the record that the immediate, predictable effect of the district court's injunction has been to prevent the Secretary of HUD from going forward with his commitments under Section 236 of the National Housing Act, 12 U.S.C. §1715z-1, to give his final endorsement to the deed of trust note for mortgage insurance between East Hills Village, Ltd. (mortgagor) and Housing America Mortgage Co., Inc. (mortgagee), and to continue interest reduction payments amounting to $7,286 per month which represent the difference between an interest rate of one percent and an interest rate of seven percent on the mortgage principal. Consequently, when the injunction went into effect, the mortgage promptly went into default, and the mortgagee claimed mortgage insurance benefits from the Government. Since the district court's injunction ostensibly forbids the Secretary of HUD from settling such

a claim, the project is now in limbo awaiting a resolution of this suit.

Our task on this appeal is to determine whether the injunction granted below was, under the circumstances of the case, "tailored to remedy the specific harms shown." *Davis* v. *Romney*, 490 F.2d 1360, 1370 (3d Cir. 1974). If the injunction does not directly affect the personal grievances for which plaintiffs sought redress then the cause must be remanded "* * * so that, if possible, an injunction may issue more narrowly drawn to meet the needs of this case." *Id.* Here the fundament of plaintiffs' claim is that HUD's decision to give federal assistance to the East Hills Village project inexorably led to an increase in racial and socio-economic concentration which, plaintiffs claim, inevitably results in urban blight. Yet here the district court injunction was issued after the project was essentially completed, and the complained-of injuries already sustained. If plaintiffs had sought and the district court granted preliminary injunctive relief in June of 1971 when the original complaint was filed and before construction had begun, the usefulness of halting federal financial assistance would have been obvious.[2] But such is not the case.

The goal of equitable relief is not to punish the wrongdoer; it is to restore the plaintiff to the enjoyment of the right which has been interfered with to the fullest extent possible or to prevent violation of a right before the threatened injury is done or further violation after the injury has been partially affected. The relief provided by the district court in this case cannot achieve either the

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2. The district court opinion notes that "[t]he plaintiffs in this case did not seek a temporary injunction because they were in no position to give the substantial bond that would have been required to stop construction."

restorative or preventive functions of equity. First, enjoining federal financial assistance has the effect of virtually eliminating any public control over the project's operation. Second, this belated termination of federal support cannot alter the fact that the racial composition of this neighborhood has already become predominantly black. We must further recognize that the project has been constructed and is already occupied by almost two hundred tenants. Under these circumstances, termination of the governmental financial assistance promised to the owners and the mortgagee is not an appropriate remedy. What is needed are imaginative solutions—aimed at realistically dealing with the problems emanating from HUD's decision. Indeed, the district court in its order of October 9, 1973, denying the federal defendants' motion for a stay of the injunction pending the court's final order, recognized that HUD should play a major role in providing solutions to the problems. The court stated:

> Surely many other uses of the facility, which would not result in driving out white residents and increasing blight of the ghetto, could be found. The defendants should have the employees, facilities, and know-how to develop such alternative uses.

The district court did not pursue this line of reasoning but instead chose to entirely remove the Government from participation in the project. We think that in doing so the district court failed to tailor a remedy for the specific harms shown, and that the case must be remanded for the drawing of a narrower and more useful remedy.

Whatever may have caused the "* * * callous indifference of the law by a government bureau," as the district court described HUD's site selection decision, it nevertheless remains true that the executive branch is part of the

Government and the judiciary ought not to act on the assumption that a coordinate branch will continue to fail in its essential public duties. The executive branch does indeed, as the district court suggested, have the expertise and facilities, if they are at all available, to develop and supervise the implementation of corrective uses for East Hills Village. On remand, HUD should be given an opportunity to submit a report on alternative relief to remedy the problems flowing from its original, ill-advised project approval. We are advised in the Secretary's brief that on remand in the similar case of *Shannon* v. *HUD*, 436 F.2d 809 (3d Cir. 1970), the district court ordered that the remedies to be considered by the agency "shall include, but not be limited to, demolition and reconstruction; renovation and modification * * *; additional construction in the area; construction in adjacent areas; and the revision of the administration of federal site selection regulations."[3]

The Secretary suggests that relief similar to that fashioned by the district court on remand in the *Shannon* case may be appropriate here. While we leave the task of fashioning a proper narrowed decree to the district court on remand, we do take judicial notice of the severe shortage of adequate housing for persons of low and moderate incomes. Certainly the rights of existing tenants should be considered in fashioning an appropriate remedy. In addition, the district court should examine the usefulness and propriety of promoting racial balance in the housing project by the use of affirmative racial controls to govern the entrance of new tenants.[4]

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3. Quoted in appellants' brief at 36-37.

4. *See Otero* v. *New York City Housing Authority*, 484 F.2d 1122, 1140 (2d Cir. 1973); Ackerman, "Integration for Subsidized Housing and the Question of Racial Occupancy Controls," 26 Stanford L.Rev. 245, 262-263, 270 (1974).

In summary, on remand the district court should:

1) vacate its permanent injunction;

2) permit HUD to complete permanent financing of this project;

3) retain jurisdiction; and

4) fashion appropriate relief which will minimize the effects of the government's failure to observe its own procedural requirements and which will best assure that this project will ultimately benefit both the tenants and the community.

Remanded for further proceedings consistent with this opinion.

APPENDIX B

IN THE
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Civil Action

No. 19474-2

FERINAND GRAVES, et al.,
Plaintiffs,

vs.

GEORGE ROMNEY, et al.,
Defendants.

MEMORANDUM OPINION AND JUDGMENT

(Filed April 6, 1973)

The history of this litigation is unbelievable. It all started in November of 1970 when a notice appeared in the Kansas City Star that a vacant tract of property at 75th and Cleveland in Kansas City, Missouri had been rezoned to permit construction of an apartment. Upon inquiry at the City Hall by one of the plaintiffs, who was a homeowner in this area, it was learned that this was to be a HUD sponsored and assisted project. Immediately thereafter, a large group of black and white residents of this community formed an association, called the "Southeast Homeowners' Association," to oppose the building of such a project in their middle-class, racially integrated neighborhood. A number of these people had had experience in the "turn-over" phenomena in racially integrated neighborhoods, which resulted in the flight of the middle-

class homeowners and resulting urban blight. They lived on the edge of such an area and in a school district which had a predominantly black enrollment, and they feared that the addition of a large low income subsidized housing project would cause their neighborhood to become a segregated black community.

The new association immediately sent a representative before the Planning and Zoning Commission of the City, but they were told that their protest was too late. A letter was then written to the Regional Director of HUD expressing the concern of the residents of the area, to which the Regional Director replied that no commitment had yet been made in regard to this project.

Personal interviews were obtained with the Regional Director by a representative of the association on April 30, 1971, at which there were arrangements made to have a meeting of representatives of the association with representatives of HUD on May 13, in regard to this protest.

However, on May 1, 1971, in a meeting between the Area Director of HUD and a representative of the association, the Area Director stated that the project was ready to be approved and that a feasibility letter was about to be issued. Before the May 13 meeting, the representative of the association was advised that the decision had been made and there was no need for the May 13 meeting.

The representatives of the association immediately sent a night telegram to the Area Director and stated that they expected to meet with him the next morning. When the representatives arrived the next morning, only two subordinate employees met with them, but upon their insistence, the Area Director met with them for a very few minutes and stated that the decision had already been

made to fund the project and that he would not reconsider it.

Representatives of the association then contacted the City Council, which expressed dismay at the proposal of such a project being built at the proposed location. On May 21, 1971, the Mayor of Kansas City, Missouri issued a statement on "the need for a policy of dispersal in minority housing in the Kansas City Metropolitan Area," specifically condemning the federally assisted project at 75th and Cleveland Avenue. On the same date, the HUD officials received a letter from the attorney for the Southeast Homeowners' Association advising that the association intended to take legal action to prevent the funding of the project.

On May 27 attorneys for the plaintiffs visited the HUD Director at his office, requesting a hearing and advising him that the City Council was considering a resolution requesting reconsideration of the project. They were advised that the project would be funded and that no hearing would be allowed. On the next day plaintiffs' attorney delivered to the Area Director a letter advising him that an immediate suit would be filed for an injunction against this project.

On the same day, May 28, 1971, the City Council of Kansas City, Missouri adopted a resolution requesting HUD to hold a public hearing on the proposed project at 75th and Cleveland. The Area Director responded to this resolution by a letter stating that a public hearing "goes beyond the requirements of federal statute and HUD procedures and, therefore cannot be held." The Mayor responded to this with citations to a number of federal cases (which will be discussed later) in which decisions of HUD on the location of such projects had been reversed.

and certain criteria for the location of such projects had been established.

Without any public hearing, and without any further evaluation or consideration of the protests by the residents, by the City Council, and by the Mayor, the HUD Director signed a so-called "feasibility letter" on June 3, 1971. Admittedly, such a letter was not a binding contract between HUD and the developers. The only effect of the letter was to allocate and freeze the funds for the project before the close of the Government's fiscal year on June 30. The actual HUD commitment, which was a contract with the developers, was executed November 19, 1971.

It is true that at the time of the consideration of this project no regulations had been issued by HUD which gave specific guidelines or specific directions in regard to the implementation of the Civil Rights Act of 1968. However, in June of 1971, HUD prepared proposed regulations setting forth such criteria (36 F.R. 12032/38, June 24, 1971), but, even more important, in 1970 the Third Circuit had decided the case of *Shannon* v. *HUD*, 436 F.2d 809, which held that HUD "must utilize some institutionalized method whereby in considering site selection or type selection it has before it the relevant racial and sociological information necessary for compliance with its duties under the 1964 and 1968 Civil Rights Act." This was one of the cases that Mayor Wheeler had cited in his severe criticism of the proposed location and request for a public hearing.

Of necessity, all of the evidence in this case as to whether or not the HUD officials considered any racial or sociological information to determine whether the selection of this site complied with the 1964 and 1968 Civil Rights Act came from the files and testimony of the HUD officials. There is no evidence whatsoever that any institutionalized method was used or even considered. The

overwhelming weight of the evidence from the defendants' own witnesses is that they had the money available to approve four or five projects in the Kansas City Metropolitan Area before June 30, 1973, or they would "lose" the money. The evidence further indicates that their sole concern was economic feasibility of the projects to be approved and that they totally disregarded all other considerations. There was no contact made with a single resident of the area of the proposed location, nor with any of the planning commissions of the City of Kansas City. There was no investigation of the school situation, either in regard to overcrowding or in regard to racial balance and the impact of a large project such as this in the school district. The one staff member who could possibly claim to even have the responsibility of looking into considerations affecting racial problems, urban blight and the effect of such a project on the question of segregation was an employee whose duties were bureaucratically labeled "Equal Opportunity Division." He started work in this capacity in December of 1970 and prior to that had been a laboratory analyst for Proctor & Gamble. Previous to that he had been a real estate salesman and an apartment house manager. His testimony, both by deposition and at the trial, clearly indicated that he had no conception of, and gave no consideration to, the adverse effects on the neighborhood that could possibly result from the location of this low income housing, on what he himself termed "the periphery" of the black belt.

This Court believes that under the authority of *Shannon* v. *HUD*, *supra*, the plaintiffs could be granted the requested relief upon the facts stated above. However, the Court heard a great deal more evidence on the question of whether the decision by the defendants to finance the 75th and Cleveland project violated plaintiffs' civil

rights. The facts which HUD should have considered and taken into account in its determination as to the feasibility of this project under the 1964 and 1968 Civil Rights Acts were fully developed, in detail, and documented by a large number of exhibits. Briefly summarized, these are the facts as shown by the evidence.

Residential housing for blacks in Kansas City is concentrated in a so-called "black belt," which is bounded on the west by Troost Avenue and on the east by Topping Avenue, the Big Blue River, the Kansas City Southern Railway Lines, an industrial park, and I-435. The northern boundary is variously described as 12th or 15th Street and, as shown by census tracts, over the years, has continually moved south. Basically, 75th Street has been considered the southern boundary. A large amusement park is located on the south side of 75th Street at Troost, and extends east for several blocks, and this park is a natural barrier. The project is between this park and the industrial park to the east. The homes for non-whites in Kansas City are located almost exclusively in this black belt. Historically, when neighborhoods reached the "turn-over point," the middle income homeowners, both black and white, left the neighborhood very rapidly, and as it became an all-black neighborhood, urban blight and decay set in immediately. The evidence definitely established in this case, as in many other reported cases on the same subject, that the increase in racial concentration of minorities has been accompanied by neighborhood deterioration and the creation of slums and blighted ghettos.

The proposed apartment complex is on the south side of 75th Street, and in the extreme northern end of a census tract which is largely white. For this reason census tract figures can be misleading, because the apartment site is almost completely isolated from the residences to

the south and southwest. For all practical purposes, it is shielded on three sides, the east, south and west by an industrial park, the Kansas City Southern Lines, Swope Park and Fairyland Park. The immediate residential neighborhood is only to the north and northwest, the adjacent census tract to the north being No. 89, whereas the project itself is located in census tract No. 90. In 1960 tract No. 89 was less than .5% black, but in 1970 the tract was 62% black. However, the census tracts in the "black belt" further north are more integrated. They are neighborhoods of small houses of middle income families and mostly range from 5% to 50% non-white. These are the neighborhoods from which the membership of the Southeast Homeowners' Association came and in which all of the plaintiffs reside.

It should also be mentioned that the evidence showed that the new apartment complex will be located in the Southeast School District of Kansas City. Southeast Senior High School was 79.6% black in the 1970-71 school year and 92.2% black in the 1971-72 school year. Southeast Junior High School was 85.5% and 91% for those two years. Blenheim Grade School was 53.9% and 71.6%, and Knotts Grade School was 72.6% and 84.3%, respectively. The evidence further disclosed that these are the most overcrowded schools in the Kansas City school system. At the high school several classes are held simultaneously in the cafeteria and in the auditorium, because there are thirteen teaching stations in the high school for which no classroom space is available. Four relocatable units are in use at the junior high school.

The proposed project has forty-two 2-bedroom units, for the use of two to four people, and sixty-eight 3-bedroom units for families of four to six people. It is reasonable to believe that there will be 500 tenants of whom

300 will be children, many of school age. These school figures are significant, not only to demonstrate the impact in sheer numbers on already heavily overcrowded schools, but from the fact, which was testified to by a number of witnesses, that although the proposed project can be occupied by white families with limited income, white families with school age children simply do not move into a school district in which the schools are over 90% black. If this is true, and the Court finds it to be a reasonable assumption, the result will be that the 500 occupants of the apartments will be almost exclusively black, the racial balance of the neighborhood will be tipped heavily, and the schools will not only be even more crowded, but the percentage of black pupils will be increased.

The evidence clearly showed that a number of black and white families in the neighborhood of the proposed project anticipated that this would be the result when the apartment was authorized (many having gone through the same experience in past years further north in the same black belt). At the time of the trial some homes had been sold and more were trying to sell their homes, solely because of this project.

A number of witnesses who work for commissions, councils and the school board in the field of city planning, housing, and human relations all testified that the impact of this project would be, in the words of one witness, a catastrophe, because it will have an adverse effect on previously successful efforts by blacks and whites to keep racially balanced neighborhoods. The reason being that the white residents will lose hope that the area can remain balanced, and when they begin their exodus, the black residents who take pride in their homes will also leave, because they know that blight can soon be expected.

The opinions of all these witnesses, many professionals in their fields, all very experienced in the pattern of racial housing were completely available to HUD before any decisions were made on this project. Certainly, after the location was condemned by the City Council and by the Mayor and the association of the homeowners of the neighborhood, there was no reason that the HUD officials could not have re-examined their position and made at least some evaluation of the questions raised by these protesting organizations and officials. This is especially true in view of the obvious fact that no consideration was given by HUD, in their original evaluation of the site, to the effect of the project on racial segregation, or school segregation, or on any of the other socio-economic and racial factors which should have been considered. A great deal more evidence could be summarized, all of which would be cumulative. The defendants' evidence is not worthy of summarization. For example, one of the employees of defendant testified that he believed the occupancy of the apartments would be 40% to 50% black. On cross-examination, he stated that he based this figure on the occupancy of a completed 236 project in another neighborhood. When asked what the racial composition of that neighborhood was at the time the apartment house was built and ready for occupancy, he stated that it was a 100% white neighborhood in an almost 100% white school district. Of course, the comparative basis for his estimate was not based on a comparative state of facts.

The plaintiffs in this case did not seek a temporary injunction because they were in no position to give the substantial bond that would have been required to stop construction. Unfortunately, some of the harm done by the improvident authorization of this project has already occurred by sales of homes in the neighborhood. A por-

tion of the apartment buildings are already completed and occupied.

The Court finds all of the issues in this case in favor of the plaintiffs. Their standing to sue and secure this relief is well analyzed and upheld in the case of *Shannon* v. *HUD, supra.* In addition to that case, there are a number of other federal cases holding that the plaintiffs are entitled to relief under the Civil Rights Acts of 1964 and 1968. (See *Hicks* v. *Weaver,* 302 F. Supp. 669 (D.C. La., 1969); *Gautreauex* v. *Romney.* 448 F.2d 731 (C.A. 7, 1971), *cert. den.* 91 S.Ct. 1378.) It is therefore

ORDERED AND ADJUDGED that the United States Department of Housing and Urban Development, the Secretary of the Department of Housing and Urban Development, and all of their agents, subordinates and employees be, and they hereby are, permanently enjoined and restrained from doing or taking any further steps in the finalization of mortgage insurance on the East Hills Village Project in Kansas City, Missouri and are further enjoined and restrained from giving, granting, making or paying any type of federal financial assistance to this project; and it is

FURTHER ORDERED that the defendants herein file with this Court within thirty (30) days from this date a statement of the number of units of this project now completed, the number now occupied, and the racial composition of the tenants; and it is

FURTHER ORDERED that the defendants file a written report with this Court within thirty (30) days stating in detail what financial assistance by way of mortgage insurance and by way of direct payments has been made to the date of that report to developers of the East Hills Village Project; and it is

FURTHER ORDERED that the Court retain jurisdiction of this case until such reports are filed and a final determination is made, after notice and hearing, as to what relief may be necessary in connection with the completed apartments to further implement this decision and give full relief to the plaintiffs herein.

The costs of this action are taxed to the defendants.

/s/ William R. Collinson
District Judge

ORDER DENYING DEFENDANTS' MOTION FOR NEW TRIAL

(Filed May 18, 1973)

Defendants have filed a motion for new trial in this Court raising a number of questions. The Court will discuss the assignments of error, which the Court believes are not fully discussed and decided in the memorandum opinion filed herein. The first assignment of error is that the Court erred in ruling that plaintiffs have standing to sue because the plaintiffs sought to bring this action as a class action and the Court made no order determining this as a class action. The Court determined early in this suit that it was unnecessary to become involved in the expenses and intricate mechanics of hearing evidence on the class action issue and giving notice to all the members of the class if it was so determined. Under the clear authority of *Shannon* v. *HUD*, 436 F.2d 809 (C.A. 3, 1970), the group of plaintiffs in this case, all residents of the neighborhood in which the apartment project was being constructed and many or all of whom were representatives of a neighborhood association of both white and black residents of that neighborhood, which had been organized to oppose the construction of this apartment project and who proved by convincing evidence that the concentration of lower income black residents in their neighborhood would adversely affect their investment in their homes and the quality of the schools which their children attend, clearly had standing to maintain this suit.

The defendants contend that the Court erred in ruling that defendants failed to use some institutionalized method in considering site selection for this project. The precise issue is considerably narrower than this bald statement. The precise ruling was that HUD had failed to "utilize

some institutionalized method whereby in considering site selection or type selection it has before it the relevant racial and sociological information necessary for compliance with its duties under the 1964 and 1968 Civil Rights Act." *Shannon* v. *HUD, supra.* Every employee of the defendant who was a witness testified that there was no institutionalized procedure used implementing the Civil Rights Acts and, in fact, the defendants' evidence overwhelmingly demonstrated that racial and sociological information was never considered in the site selection process.

The other assignment of error which may not be fully covered by the Court's memorandum opinion is that the Court refused to admit and consider evidence that the defendants reevaluated the project in accordance with its proposed rules and regulations to meet the criteria of *Shannon* v. *HUD.* The Court did admit and hear all of the evidence as to this reevaluation, after the project had been fully approved and commitments made, and considered it as having no basis in fact. By using census tracts with insignificant population, completely geographically isolated from this project, the reevaluation made a determination that the project was "outside the area of minority concentration." This allowed a finding of an "adequate" rating on the determination of whether the location was discriminatory. Without even considering the undisputed evidence in the case as to the census tracts, it is obvious to anyone that the Mayor of the City, the City Council, and the neighborhood association immediately adjacent to the building site would not have protested so vigorously that this site increased racial concentration if it could have been found in any way that it was outside the area of minority concentration. This after-the-fact evaluation was obviously an attempt to justify, to their superiors, a very bad decision which had been made many

months before by the Kansas City office. The only evidence this Court recalls having refused to admit was the further evidence that this "paper picture", which was not based on facts, was then approved back in Washington.

Defendants have further requested a stay of judgment in this case alleging irreparable damage to contractual rights of third parties, suggesting that there will be litigation based upon the commitments made by the Government which this judgment enjoins the Government from completing. The Court will not rule on this matter at this time but will reserve its ruling until the filing of the two written reports which are ordered in the Court's memorandum opinion.

It is therefore

ORDERED that defendants' motion for a new trial be, and is hereby, denied.

/s/ William Collinson

ORDER AND FINAL JUDGMENT

(Filed October 9, 1973)

The defendants in this case filed a notice of appeal on June 28, 1973. On July 25, 1973 the defendants dismissed this appeal, and on August 7, 1973 filed with this Court a "Motion to Stay Injunction Pending the Court's Final Order."

It should also be noted that in accordance with an order in the Court's judgment the defendants have filed with the Court an exhibit which shows that the housing project in question was fully occupied at the time of the final judgment and that the adult tenants were 86% black and 14% white and that the minor tenants were 89% black and 11% white.

This report further shows that the project contains school age children in the proportion of 66 black and 4 white, and pre-school age children in the proportion of 111 black and 17 white.

Of course, these proportions of black tenancy are exactly as anticipated by all the witnesses for the plaintiffs at the trial of this case, and exactly the opposite as that prophesied by the so-called expert employees of HUD. The figures fully corroborate the basic complaint of the plaintiffs that the location of the project would increase segregated housing in violation of the Civil Rights Act.

The Court asked for these figures in the faint hope that, if a balanced racial mixture of tenants had resulted, the drastic remedy of an injunction might not be necessary. The pending motion to stay the injunction has no merit. Defendants have not come forward with any suggestion as to a future use of this project in a manner that would give the just relief sought by the plaintiffs. It is believed by the Court that these 110 new housing

units could conceivably be converted to some use, such as housing for aged, infirm or disabled people who deserve decent subsidized housing. Surely many other uses of the facility, which would not result in driving out white residents and increasing the blight of the ghetto, could be found. The defendants should have the employees, facilities, and know-how to develop such alternative uses. The defendants, and the developer, and the lender proceeded to innovate and complete this project after bitter protest by the Mayor of the City, the City Council, and written notice from the attorney representing many of the adjoining residents. Practically all the work on the project was done after this suit was filed, and certainly all was done after notice that a suit would be filed, and even more important, from a judicial viewpoint, the whole project was authorized, commenced and completed after the decision in the case of *Shannon* v. *HUD*, 436 F.2d 809. The plaintiffs in this case have been grievously harmed by the callous indifference of the law by a government bureau. The motion of the defendants, if granted, would deny these plaintiffs no relief for the injustice perpetrated upon them. It would be a hollow victory, indeed, if this Court, after finding all the issues in favor of the plaintiffs, would take the attitude that plaintiffs' cause is just but the law can grant them no relief.

It is therefore

ORDERED that the defendants' motion to stay the injunction in this case be, and is hereby, denied; and

FURTHER ORDERED that the Court's injunction contained in the Court's Memorandum Opinion and Judgment filed April 6, 1973, be, and is hereby, declared a permanent and final injunction against the defendants.

/s/ Wm. R. Collinson
District Judge

ORDER

(Filed February 14, 1974)

The defendants have filed a motion to permit the Secretary of Housing and Urban Development to acquire the deed of trust in this case and to settle the mortgage insurance claims. The facts are clearly set out in the written suggestions filed in support of this motion. It is obvious that to grant the motion would completely nullify the Court's order in this case and would give the plaintiffs a very hollow victory. The Court's judgment is the only relief the Court can give these plaintiffs and it will not be nullified at this time. It is therefore

ORDERED that the defendants' motion to permit the Secretary of Housing and Urban Development to acquire deed of trust for mortgagee and to settle mortgage insurance claims is denied.

/s/ Wm. R. Collinson
District Judge

APPENDIX C

STATUTORY PROVISIONS INVOLVED

42 USC §3601 (Civil Rights Act of 1968):

"It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States."

42 USC §3608:

"(a) The authority and responsibility for administering this Act shall be in the Secretary of Housing and Urban Development.

(c) All executive departments and agencies shall administer their programs and activities relating to housing and urban development in a manner affirmatively to further the purposes of this subchapter and shall cooperate with the Secretary to further such purposes.

(d) The Secretary of Housing and Urban Development shall—

(3) cooperate with and render technical assistance to Federal, State, local and other public or private agencies, organizations, and institutions which are formulating or carrying on programs to prevent or eliminate discriminatory housing practices;

(4) cooperate with and render such technical and other assistance to the Community Relations Service as may be appropriate to further its activities in preventing or eliminating discriminatory housing practices; and

(5) administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter."

42 USC §2000d (Civil Rights Act of 1964):

"No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

42 USC §2000d-1:

"Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of Section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken."

42 USC §1457

Property to be used for public housing or housing for low or moderate income families or individuals

'(a) Upon approval of the Secretary and subject to such conditions as he may determine to be in the public interest, any real property held as part of an urban renewal project may be made available to (1) a limited dividend corporation, nonprofit corporation or association, cooperative, or public body or agency or other approved purchaser or lessee, or (2) a purchaser or lessee who would be eligible for a mortgage insured under section 1715L(d)

(3) or (d) (4), section 1715L(h)(1), section 1715z, or section 1715z - 1 of Title 12, for purchase or lease at fair value for use by such purchaser or lessee in the provision of new or rehabilitated housing for occupancy by families or individuals of low or moderate income: *Provided*, That when property is made available under clause (1) to an approved purchaser or lessee other than a limited dividend corporation, nonprofit corporation or association, cooperative, or public body or agency, the Secretary shall assure that the benefits of this subsection will go to the occupant of the property rather than to such purchaser or lessee."

12 USC §1715z-1

"Rental and cooperative housing for lower income families—Authorization for periodic interest reduction payments on behalf of owner of rental housing project"

"(a) For the purpose of reducing rentals for lower income families, the Secretary is authorized to make, and to contract to make, periodic interest reduction payments on behalf of the owner of a rental housing project designed for occupancy by lower income families, which shall be accomplished through payments to mortgagees holding mortgages meeting the special requirements specified in this section.

Restrictions on payments; payments with respect to projects financed under State or local programs

(b) Interest reduction payments with respect to a project shall only be made during such time as the project is operated as a rental housing project and is subject to a mortgage which meets the requirements of, and is insured under, subsection (j) of this section: *Provided*, That interest reduction payments may be made with respect to a rental or cooperative housing project owned

by a private nonprofit corporation or other private nonprofit entity, a limited dividend corporation or other limited dividend entity, or a cooperative housing corporation, which is financed under a State or local program providing assistance through loans, loan insurance, or tax abatements, and which prior to completion of construction or rehabilitation is approved for receiving the benefits of this section.

Amount of payments

(c) The interest reduction payments to a mortgagee by the Secretary on behalf of a project owner shall be in an amount not exceeding the difference between the monthly payment for principal, interest, and mortgage insurance premium which the project owner as a mortgagor is obligated to pay under the mortgage and the monthly payment for principal and interest such project owner would be obligated to pay if the mortgage were to bear interest at the rate of 1 per centum per annum.

Mortgage handling expenses

(d) The Secretary may include in the payment to the mortgagee such amount, in addition to the amount computed under subsection (c) of this section, as he deems appropriate to reimburse the mortgagee for its expenses in handling the mortgage.

Operation of project in accordance with requirements respecting tenant eligibility and rents prescribed by Secretary

(e) As a condition for receiving the benefits of interest reduction payments, the project owner shall operate the project in accordance with such requirements with respect to tenant eligibility and rents as the Secretary may prescribe. Procedures shall be adopted by the Secretary for

review of tenant incomes at intervals of two years (or at shorter intervals where the Secretary deems it desirable).

Establishment of basic and fair market rental charges; rental for dwelling units

(f) For each dwelling unit there shall be established with the approval of the Secretary (1) a basic rental charge determined on the basis of operating the project with payments of principal and interest due under a mortgage bearing interest at the rate of 1 per centum per annum; and (2) a fair market rental charge determined on the basis of operating the project with payments of principal, interest, and mortgage insurance premium which the mortgagor is obligated to pay under the mortgage covering the project. The rental for each dwelling unit shall be at the basic rental charge or such greater amount, not exceeding the fair market rental charge, as represents 25 per centum of the tenant's income. . . .

Insurance of mortgages; definitions; eligibility for insurance; mortgage requirements; property or project requirements; sale of individual dwelling units; release of mortgagor from liability or release of property from lien of mortgage

(j)(1) The Secretary is authorized, upon application by the mortgagee, to insure a mortgage (including advances on such mortgage during construction) which meets the requirements of this subsection. Commitments for the insurance of such mortgages may be issued by the Secretary prior to the date of their execution or disbursement thereon, upon such terms and conditions as he may prescribe."

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-733

FERINAND GRAVES, ET AL., PETITIONERS

v.

JAMES T. LYNN, SECRETARY, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioners are residents of a racially integrated neighborhood adjoining East Hills Village, a federally-subsidized low and moderate income housing project located in Kansas City, Missouri. In June 1971, they sued to enjoin construction of the project, then still in the planning stage, on the grounds that the Secretary and the Department of Housing and Urban Development (HUD) had violated the Civil Rights Acts of 1964 and 1968 by selecting the East Hills Village site without considering its effect in increasing racial concentration in the neighborhood. Petitioners contended that the HUD project would cause the integrated neighborhood to become all-black. A preliminary injuction was not sought; thus construction of the project commenced and continued during the course of the law suit.

After an evidentiary hearing, the district court, relying on *Shannon* v. *United States Dept. of Housing & Urban Dev.*, 436 F.2d 809 (C.A. 3), held that the Housing Act of 1949, 42 U.S.C. 1441 *et seq.*, together with the Civil Rights Act of 1964, Title VI, 42 U.S.C. 2000d *et seq.*, and the Civil Rights Act of 1968, 42 U.S.C. 3601 *et seq.*, required that HUD "must utilize some institutionalized method whereby, in considering site selection or type selection, it has before it the relevant racial and socio-economic information necessary for compliance with its duties under the 1964 and 1968 Civil Rights Acts" (Pet. App. A12, quoting 436 F.2d at 821). The district court found that the East Hills Village project would have a detrimental impact on the racial balance of nearby areas, and that HUD's failure to consider this fact entitled the plaintiffs to relief under the Civil Rights Acts.

By the time the district court announced its decision on April 6, 1973, the project was already substantially completed and occupied.[1] As the district court no longer could prevent completion of the project, it permanently enjoined any further federal financial assistance to the project.

On appeal, the government did not challenge the findings of civil rights violations, but challenged the remedy of reneging on contracts made for the project. The government pointed out that those who built and financed the project in reliance on the HUD contracts, and who are not parties to this action, would thereby lose several hundred thousand dollars. The government also urged that the injunction removes the government from any further involvement in the project, thereby eliminating the only agency that could be compelled to oversee the project to at least ameliorate the existing racial imbalance.

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[1]At this time, over 86 percent of the occupants of the project were black.

The court of appeals in a unanimous opinion (Pet. App. A1-A8), reversed and remanded the case to the district court with instructions to (Pet. App. A8):

> fashion appropriate relief which will minimize the effects of the government's failure to observe its own procedural requirements and which will best assure that this project will ultimately benefit both the tenants and the community.

The decision below is correct, and there is no conflict among the circuits. Moreover, review at this time would be inappropriate because no final decree has yet been entered and the district court has not had the opportunity to consider the matter of alternative relief.

1. Contrary to petitioners' contentions (Pet. 16-27), the court of appeals has not ruled that federal financial assistance may never be enjoined where a project has been completed. The court of appeals appears to have recognized that in a proper case such a prohibition may be an appropriate remedy (Pet. App. A7). However, in this case the court of appeals found that (Pet. App. A5-A6):

> The relief provided by the district court in this case cannot achieve either the restorative or preventive functions of equity. First, enjoining federal financial assistance has the effect of virtually eliminating any public control over the project's operation. Second, this belated termination of federal support cannot alter the fact that the racial composition of this neighborhood has already become predominantly black. We must further recognize that the project has been constructed and is already occupied by almost two hundred tenants. Under these circumstances, termination of governmental financial assistance promised to the owners and the mortgagee is not an appro-

priate remedy. What is needed are imaginative solutions—aimed at realistically dealing with the problems emanating from HUD's decision.

The court of appeals could properly order a remand to the district court to consider alternatives to the drastic and inflexible remedy imposed by the district court.

2. Petitioners also err in contending (Pet. 16-18) that the decision below is in conflict with *Shannon* v. *United States Dept. of Housing & Urban Dev.*, 436 F.2d 809 (C.A. 3). There, as here, the appellate court remanded to the district court to consider alternative forms of relief. See 436 F.2d at 822-823. In each case HUD agreed that under its new site selection guidelines, 36 Fed. Reg. 12032 (1971), the challenged project would not have been approved. Despite that determination, on remand the district court in *Shannon* lifted the injunction against further federal assistance and ordered completion of permanent financing. Thus, there is no conflict with *Shannon*.[2]

3. In the absence of a preliminary injunction, the private developer had every right to proceed with construction of the East Hills Village project while this litigation was pending. Although petitioners contend that these private individuals—released by petitioners as parties to this lawsuit (App. in the court of appeals, p. 23)—should have stopped construction once this lawsuit was filed (Pet. 5-7; 2[illegible]), such housing would seldom be completed if construction could be stopped by the mere filing of a suit. A preliminary injunction is designed to pre-

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[2]There is also no conflict with *Ely* v. *Velde*, 497 F.2d 252 (C.A. 4) (Pet. 18-20), which terminated Federal funding obtained for a prison whose location was selected in violation of the National Environmental Policy Act and National Historic Preservation Act. In *Ely* the project had not yet begun, and the fund cutoff affected only the State of Virginia, the body that had failed to comply with the NEPA and NHPA.

vent the occurrence of such situations as the instant case, where irreversible action has been taken. The private parties could reasonably assume that since petitioners did not seek a preliminary injunction, they were free to fulfill their contract. Moreover, petitioners' fear that they would be unable to post an injunction bond does not excuse failure to seek a preliminary injunction. Under Rule 65(c), Fed. R. Civ. P., the amount of security (applicable only to protect a "party"—in this case the United States) rests in the sound discretion of the district court. Petitioners would not, of course, know the actual amount required until they sought the preliminary injunction.[3]

Petitioners' position that the private non-parties must now bear the entire financial loss for the government's civil rights violations (Pet. 20) would have adverse practical implications. Private parties would certainly be deterred from participation in HUD sponsored programs such as Section 236 of the National Housing Act, Title II, 82 Stat. 498, as amended, 12 U.S.C. 1715z-1, involved herein, if faced with the prospect of financial ruin from suits to which they were not parties, based on violations in which they had no part. Consequently, persons of low and moderate income would suffer by the diminution of private construction of such projects.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1975.

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[3]Contrary to petitioners' view (Pet. 7), and assuming the merit of their position, petitioners could have prevented the developers from building the project with federal funds if they had sought preliminary relief.

FILED
MAR 1 1975

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-733

FERINAND GRAVES, ET AL., *Petitioners*,

vs.

JAMES T. LYNN, SECRETARY, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ET AL., *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONERS' REPLY TO RESPONDENTS' MEMORANDUM

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In the Supreme Court of the United States

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PETITIONERS' REPLY TO RESPONDENTS' MEMORANDUM

The Government's superficial treatment of the facts in this case and authorities cited should not obscure the following:

1. In *Shannon* v. *HUD,* 436 F.2d 809 (3rd Cir. 1970), the appellate court expressly recognized the enjoining of federal financial assistance to a completed illegal project as a remedy to be considered by the district court and specifically ordered such remedy in its remand. The fact that the district court in that case then selected an alter-

native remedy does not affect the principle established by the Third Circuit that such remedy is available and appropriate. The Eighth Circuit below reversed the district court's choice of enjoining federal financial assistance and explicitly eliminated such remedy from further consideration by the district court solely because construction of the project had been substantially completed. (Pet. 15-16.) Thus, the two circuit court decisions are clearly in conflict on that fundamental issue and the resolution of the conflict will establish an important precedent for recurring questions concerning use of federal funds for projects held to be illegal. (Pet. 20-27.)[1]

Respondents' footnote reference (Resp. Memo. 4) to *Ely* v. *Velde,* 497 F.2d 252 (4th Cir. 1974), avoids the significant holding of that case, *i.e.,* that federal funds cannot be used for a project that does not comply with federal law. Furthermore, the order there was made despite reliance of the State of Virginia on the acquiescence of the federal Law Enforcement Assistance Administration in the reallocation of the federal funds to other programs in the state penal system "including substantial expenditures for a jail in Norfolk, Virginia." *Id.* at 255.

2. Contrary to the Government's suggestion (Resp. Memo. 4-5), the purpose of a preliminary injunction is to protect a plaintiff who might be harmed by unlawful action, not to protect a defendant who proceeds with such

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1. The Government's claim that this case is not now appropriate for review (Resp. Memo. 3) is ill-founded. The decision below is final as to the reversal and elimination of the remedy of enjoining federal financial assistance to this project, the remedy which the district court selected from others as the only appropriate one. (Pet. 24-26.) In any event, lack of a final adjudication in the case does not preclude this Court from considering an important question of federal law raised in a U. S. court of appeals. 28 U.S.C. § 1254(1). *E.g., United States* v. *General Motors Corp.,* 323 U.S. 373, 377 (1944).

action at his own risk. Petitioners' inability to post an injunction bond in this case should not mean that the Government can proceed in violation of law and thereby foreclose an effective remedy for such violation. Although the defendant developers could construct the project, they could not be assured of federal financial assistance for it in the event such assistance was determined to be contrary to law. The Government and the developers proceeded at their own risk.[2] Petitioners should not be denied the remedy to which they are entitled because they could not afford a bond to prevent the Government's initial undisputed violation of law. The continued violation of that law can and should be enjoined.[3]

It is therefore respectfully submitted that the petition for writ of certiorari should be granted.

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Attorneys for Petitioners

February 28, 1975

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2. The developers were not dismissed from the case until March 13, 1972, almost nine months after suit was filed on June 18, 1971, and by that time the project was almost completed. (Pet. 6-8.) Dismissal at the developers' request was appropriate because petitioners could seek and sought no relief from them—only the enjoining of financial assistance by the Government to the project.

3. The Government's expressed anxiety about the consequences to federal housing programs resulting from the threat of financial loss to unsuspecting non-party developers (Resp. Memo. 4-5) is unrelated to the facts in this case. (Pet. 5-7.)